

**EXHIBIT 11**  
**[FILED UNDER SEAL]**



1 this case.

2 And so to say that it doesn't have any factual  
3 relevance is, to me, wrong. That's the easiest way to say  
4 it. The size and financial condition are extremely relevant  
5 on issues of liability, on the ability to influence prices.

6 Now, take it the next step. A jury, we believe,  
7 will be the proper respondent on these issues. There are  
8 three possible scenarios. One scenario, there is no right to  
9 a jury trial in America on the issue of a penalty. I don't  
10 think you'll find that to be the case at all. And I think  
11 that it's outrageous to even suggest it. Possibility number  
12 two, we have an absolute constitutional right to a jury trial  
13 on the penalties. Or possibility number three, it's up to  
14 the Court, and the Court can decide to have a discretionary  
15 jury, or the Court can decide to let a jury make that  
16 decision.

17 But if we've got a right to a jury trial upon  
18 pleading it on these penalty issues, and we do want to have  
19 it briefed, I'd love to see what their argument is going to  
20 be. I'm not going to try and make mine now. I think it  
21 should have been filed back in August. But if this is what  
22 they believe to be true, then at some point in time we can  
23 cross some of these issues then vis-à-vis the experts and how  
24 much it may take.

25 You know, when we came before the Court before, we

1 has each side's preferred way of proceeding on that, or a way  
2 you think is most efficient for the Court.

3 And then, secondly, you were just touching on what  
4 I thought might still be out there as something you want to  
5 discuss, and the way that it's framed in your -- in document  
6 636, which is the request for the conference, you use a  
7 for-example and say, you know, you've got 17 different  
8 states' statutes --

9 MS. PATRICK: Right.

10 THE COURT: -- and you raise the question of we've  
11 got legal issues the Court would need to decide, essentially,  
12 about how proof is going to be made on for violations --

13 MS. PATRICK: Um-hum.

14 THE COURT: -- numbers of violations, and I think  
15 also the nature of penalties in relation to violations.

16 MS. PATRICK: So let me give the Court a sense of  
17 what we're talking about there. You heard, at the hearing on  
18 the motion to dismiss, Mr. Keller tell you that the States  
19 don't have to prove harm and they don't have to prove any  
20 particular ad buyer or ad seller was injured, but they have  
21 to prove Article III standing, injury in fact.

22 Now, that is, you know, angels on the head of a  
23 pin. I'm not sure how you prove injury and fact without  
24 proving that someone was actually harmed and that that  
25 someone is the general populace of the state as opposed to

1 ruled on we have claims remaining, claims going forward along  
2 these lines, I agree with you that before the trial starts,  
3 the Court will have to resolve as a matter of law these  
4 issues for any such remaining claims so that everybody knows  
5 what the proof needs to look like or has to look like before  
6 we get into trial.

7 And so it seems to me that this will need to be  
8 dealt with if and when we get to that place where we're going  
9 into trial, there are claims remaining under these DTPA  
10 statutes, and we want to make sure that we understand how  
11 liability must be proved for each one of them. And then we  
12 have the other issues we've already talked about today which  
13 is I would say the backside of those issues, which is penalty  
14 issues and how that would proceed.

15 But I will be mindful of it and I will keep in mind  
16 that I need to make time before we're starting trial, for any  
17 claims that are going forward, to engage in that process.

18 MS. PATRICK: And, Your Honor, that's really the  
19 fundamental point because these claims are only here on 1367.  
20 And even if the federal claims survive this path-breaking,  
21 novel approach to the aggregation of DTPA claims from 17  
22 states in one federal court, is we will explain to you  
23 exactly the kind of thing that really you might be  
24 well-served to say "You guys have state courts. They know  
25 where their harm is required. They're well-equipped. You're

1 So we'll stand in recess. Thank you.

2 MS. PATRICK: Thank you. May we be excused, Judge?

3 THE COURT: You may.

4 THE COURT SECURITY OFFICER: All rise.

5 (Adjourned at 2:12 p.m.)

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8 CERTIFICATE OF OFFICIAL REPORTER

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11 I, Gayle Wear, Federal Official Court Reporter, in  
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